

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1026 of 2000

With

CIVIL APPLICATION NO.5756 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

and

Hon'ble MR.JUSTICE D.A.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

-----  
KANDLA PORT TRUST, TRUSTEES OFBOARD

Versus

ASIA FOUNDATION & CONSTRUCTIONLTD.

-----  
Appearance:

MR SR BRAHMBHATT for appellant  
Mr.Mihir J Thakore, senior counsel with  
MR KETAN D SHAH for Respondent No. 1

-----  
CORAM : MR.JUSTICE M.R.CALLA

and

MR.JUSTICE D.A.MEHTA

Date of decision: 21/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE M.R.CALLA)

1. This is a defendant's First Appeal under Sec.96 of the Civil Procedure Code against the judgment and decree dated 29.1.2000 passed by Civil Judge (S.D.), Gandhidham - Kutchn in Special Civil Suit No.293/95 whereby he has made Umpire's award dated 5.5.94 to be the rule of the Court under Sec.17 of the Arbitration Act, 1940 and has upheld the rejection of the claim of defendant and decreed the claim of the original plaintiff.

2. The appellant i.e. original defendant, namely, Board of Trustees of the Port of Kandla, is a body corporate constituted under the Major Port Trusts Act, 1963, (hereinafter referred to as "KPT" for the sake of brevity) and the respondent herein i.e. original plaintiff is Asia Foundation and Constructions Ltd. (hereinafter referred to as "AFCONS").

3. Briefly stated the facts giving rise to the present Appeal are as under:-

KPT invited sealed item rate tenders for "Construction of Seventh Cargo Berth at New Kandla". The work consisted of construction of Quay and Transit Structures on RCC bored pile foundation, paved open stacking area including ground treatment, construction and maintenance of Defence Dyke, Container Freight Station and allied works. The complete tenders were to be submitted with complete offer at the office of the Chief Engineer, Kandla Port Trust, not later than 12.00 hours on 29.10.1987.

-- On the basis of the aforesaid notice inviting tenders, tenders received were opened on 1.7.88. The Tender Committee evaluated the tenders and after considering all the aspects recommended the acceptance of the offer made by the present respondent - AFCONS for a firm price of Rs.17,77,72,348/-. Acceptance of the tenders of AFCONS was conveyed on 28.7.88 with the alternative design of defence dyke amounting to Rs.17,46,21,720/-.

-- AFCONS sent letters dated 8.10.88 and 28.10.88 to the Chief Engineer of KPT.

-- On 13.12.88 first slippage of soil was observed.

-- On 9.3.89 and 10.3.89 site was visited by Port Consultants.

-- On 20.3.89 AFCONS was instructed vide site order No.25 dated 20.3.89 for providing temporary bracing to protect piles against the adverse effects of soil slippage.

-- On 16.5.89 AFCONS refused for providing temporary bracing stating that it was beyond the scope of work.

-- On 16.7.89 tilting of 14 piles was observed.

-- On 29.8.89 revised drawings were furnished to AFCONS for damaged piles.

-- On 14.9.89 AFCONS refused to act as per revised drawings on the ground of clumsy arrangements and extra financial implications.

-- On 6.10.89 Consultant, Port Trust Prof. V.S.Raju of IIT, Madras made his first visit to Kandla.

-- On 19.1.90 Prof. V.S.Raju made recommendation for strengthening of the berth.

-- On 21.2.90 work for strengthening of berth was commenced by AFCONS.

-- On 6.9.90 high power Technical Committee was appointed by Ministry of Surface Transport (MOST), Government of India to pin point the responsibility for the failure of piles.

-- In July 1991 the report of the Technical Committee was received.

-- On 16.8.91 AFCONS were asked to deposit the amount with KPT towards share of responsibility on account of failure of piles.

-- In August 1991 the work was slowed down by AFCONS.

-- In August 1991 the payment of running bills was stopped to the AFCONS.

-- In November 1991, the payment of the work done after 10.10.91 was made.

-- The actual date of completion of work was 27.12.91 and the date of issue of completion Certificate with defects as per clause 52 of conditions of contract

was 15.1.92.

-- On 15.9.92 completion of the rectification of defects was issued.

-- Arbitration Clause 63, as per arbitration Agreement was invoked on 21.7.92 by AFCONS and on 31.7.92 the Arbitration clause was also invoked by KPT requesting the Arbitrator to give reasons and pass the award claimwise.

-- One Shri A.Jayagopal was appointed as the Arbitrator by AFCONS and Shri Ananthakrishnan was appointed as Arbitrator by KPT on 21.7.92. These Arbitrators did not agree and they choose to appoint an Umpire. Thereupon one Shri T.V.Ramana Rao, retired Chief Engineer, Vishakapatnam Port Trust was appointed as the Umpire on 23.10.92 and on 7.12.93 records were submitted to the Umpire.

-- Umpire gave Award on 5.5.94 at Vishakapatnam.

-- On 18.9.94 Special Civil Suit No.145/94 was filed before Civil Judge (S.D.), Bhuj, which was later on re-numbered as Special Civil Suit No.293/95, through which the respondent - AFCONS sought an order that the Umpire's award be made the rule of the Court.

4. The Court of Civil Judge (S.D.), Bhuj has passed the order on 29.1.2000. It is this order, which has been made the subject matter of challenge in this Appeal.

5. The Umpire declared the Award as under:-

-- Regarding Claim No.1-

-- That demand of the KPT on the AFCONS for damages by way of deposit or in any other form for any sum is not sustainable and the KPT is not entitled to make any claim on the AFCONS for such damages.

-- Regarding claim No.2-

(i) KPT was directed to pay to AFCONS the amount to the tune of Rs.53,22,286.75 Ps. which was withheld from payment due to the AFCONS.

(ii) KPT was directed to pay to AFCONS the amount to the tune of Rs.8,12,942.00 Ps. which was withheld as penal recovery by the KPT for issue of cement and steel.

(iii) KPT was directed to pay to AFCONS the amount to the tune of Rs.3,78,445.65 Ps. which was withheld by the KPT towards damages from earnest money submitted by the AFCONS for tender and bills and Launch Jetty at Kandla.

The KPT was also directed to release the two bank guarantees each of Rs.10 lacs submitted by the AFCONS to the KPT as security deposit, as in view of the award as above the KPT was not found to be entitled to make any claim under the same. The KPT was also directed to pay to AFCONS the interest at the rate of 12% P.A. from the date of award till date of decree or payment whichever is earlier.

-- Regarding KPT's counter claim--

The prayer of the KPT to pass an Award in their favour to the extent of responsibility fixed on the AFCONS by the high level Technical Committee which was subsequently quantified as Rs.113.65 lacs in their letter dated 9.9.1993 and lastly revised to Rs.227.25 lacs by their letter dated 30.9.1993, was found to be not sustainable and the same was rejected.

AND

-- Further that -

Each party shall bear its own costs for conduct of the arbitration. The fees and expenses of the umpire for the conduct of the arbitration, including the filing of the Award in the Court, shall be borne in equal share by the AFCONS and the KPT.

The award as above was issued on 5.5.1994.

6. In the Special Civil Suit, which was filed before the Court of Civil Judge (S.D.), Bhuj by the AFCONS the Court made the Umpire's Award dt. 5.5.94 as the Rule of the Court on 29.1.2000 and passed the decree accordingly in favour of AFCONS and against the KPT.

7. Mr.S.R.Brahmbhatt appearing on behalf of the appellant - KPT has challenged the validity, correctness and propriety of the Award, as has been made the Rule of the Court by the Court, on the grounds that it has been passed contrary to the terms of contract and that the Umpire has exceeded the scope of arbitration and has thereby misconducted. He has also submitted that the

Report of the Expert Committee, which was appointed by MOST (Ministry of Surface Transport), has not been taken into consideration while fixing the liability of AFCONS and the claim of KPT has been wrongly rejected and he has submitted that the report of MOST ought to have been taken into consideration. Mr. Brahmbhatt has placed reliance in support of his submissions on the following decisions

- (i) AIR 1990 SC 1426 (Raipur Development Authority v. M/s. Chokhamal Contractors)
- (ii) 1999 AIR SCW 3160 (State of J & K. v. Dev Dutt Pandit)
- (iii) 1999 AIR SCW 3258 (Steel Authority of India Ltd. v. J.C.Budharaja)
- (iv) 1999 AIR SCW 3644 (Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises)
- (v) 1999 AIR SCW 2303 (Grid Corporation of Orissa Ltd. v. Balasore Technical School).
- (vi) AIR 1994 SC 219 (Food Corporation of India v. Jagdish Chandra Saha)

8. Learned counsel for the respondent - AFCONS Mr. Mihir Thakore has invited our attention to the various Clauses of the Agreement and submitted that the deflection of piles was the result of the faulty design. The fact that the design was faulty had already been pointed out to the Technical Officers of KPT by AFCONS and yet the Officers of KPT ignored the same. Mr. Mihir Thakore has submitted that so far as first and third claims are concerned, they were with regard to the amounts, which had been withheld on the ground of negligence in the construction of piles and the second claim was against AFCONS for use of excessive cement and steel, which was supplied by KPT under the terms of the Agreement. Mr. Mihir Thakore has submitted that the only question, which is required to be examined, is as to whether these claims were within the jurisdiction of the Umpire or not. He made reference to the evidence as was led, only to submit that it cannot be looked into and appreciated by this Court and he also submitted that the copy of the Report of the MOST was not made available to AFCONS. He tried to show by producing the Minutes of the arbitration proceedings that despite the order passed by the Umpire, KPT did not produce the Report of the Committee appointed by MOST. He submitted that even MOST

had found only 50% fault on the part of AFCONS, 40% fault was found to be that of Consultants and KPT itself was held liable for 10%. He has also submitted that this Report by itself is not an evidence nor the gist thereof can be said to be any evidence in the eye of law and even the gist, which was supplied, did not include such portion of the Report of MOST, which contained allegations against Consultant or KPT. He has further submitted that there is no error apparent on the face of the record and merely because the Award is not in conformity with the Report given by MOST, is no ground for setting aside the Award. In support of his submissions, Mr. Mihir Thakore has placed reliance on the following decisions:-

- (i) AIR 1990 SC 1426 ( Raipur Development Authority v. M/s. Chokhamal Contractors)
- (ii) AIR 1988 SC 1198 (Food Corporation of India v. Great Eastern Shipping Co.Ltd.)
- (iii) AIR 1994 SC 219 (Food Corporation of India v. Jagdish Chandra Saha)
- (iv) (1999)4 SCC 214 (H.P.State Electricity Board v. R.J.Shah and Company)
- (v) (1987) 4 SCC 93 (Hindustan Steel Works Construction Ltd. v. C.Rajasekhar Rao)
- (vi) AIR 1989 SC 890 (M/s. Sudarsan Trading Co. v. The Govt. of Kerala)
- (vii) (1998) 9 SCC 407 (P.V.Subba Naidu v. Government of A.P.)
- (viii) (1992) 4 SCC 217 ( Hindustan Construction Co.,Ltd. v. State of Jammu & Kashmir)
- (ix) (1987) 3 SCC 723 (Coimbatore District Podu Thozillar Samgam v. Balasubramania Foundry )
- (x) AIR 1968 SC 1413 (Gopal Krishnaji Ketkar v. Mohamed Haji Latif)
- (xi) AIR 1975 SC 1259 (K.P.Poulose v. State of Kerala)

9. We have heard learned counsel for both the sides at length. It is clearly discernible from the perusal of Sec.30 of the Arbitration Act, 1940 itself that the award cannot be set aside except for the grounds mentioned in Sec.30 i.e. unless the arbitrator or Umpire has misconducted himself or the proceedings, or that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec.35 and that an award has been improperly procured or is otherwise invalid.

So far as misconduct of the Arbitrator himself i.e. personal conduct is concerned, the illustrative cases are as under:-

- (i) Bribery or corruption.
- (ii) Partiality and bias.
- (iii) Disqualification or want of qualification of arbitration.
- (iv) Dishonesty.
- (v) Personal interest in the dispute.
- (vi) Defect in appointment of arbitrator.

The cases of defects in procedure are enumerated as under:-

- (a) Violation of principles of natural justice:-
  - (i) Sufficient opportunity not given.
  - (ii) Evidence shutout.
  - (iii) Evidence taken behind the back of the other.
- (b) Award beyond Reference.
- (c) Award influenced by extraneous circumstances.
- (d) Error apparent on the face of the Award.
- (e) Decision by ignoring very material documents on the record.
- (f) Award based on no evidence.
- (g) Award on inconsistent findings.

Besides it:-

- (i) Legal misconduct must be apparent on the face of the Award.
- (ii) Wrong decision on law or facts is not legal misconduct.

10. In the instant case, there is no question of any personal misconduct, but we have to examine as to whether the Umpire has exceeded the scope of subject matter of Arbitration agreement or not? For this purpose Clauses 62 and 63 of the Agreement in question are relevant and the same are reproduced as under:-

"62. DECISION OF THE ENGINEER TO BE FINAL:

- (i) The decision of the Engineer shall be final, conclusive and binding on all parties to the Contract upon all questions relating to the meaning and interpretation of the specifications,



designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material used on the work or any matter arising out of or relating to the specifications, designs and drawings and instructions concerning the works or the execution of or failure to execute the same, arising during the course of the works and in the guarantee period. The above shall not be the subject for arbitration, and in no case shall the work be stopped consequent on such a dispute arising and the work shall also be carried out by the Contractor strictly in accordance with the instructions of the Engineer.

- (ii) If the Contractor claims that the decision or the instruction of the Engineer is unjustified and that accordingly he is entitled to extra payment on account thereof, he shall forthwith notify this to the Engineer to record his decision and the reasons therefore in writing and shall within two weeks state his claims in writing to the Engineer thereafter.

The "Engineer" shall thereafter within four weeks of the receipt of the claim reply to the points raised in the claim. Unless resolved by negotiation or discussion immediately thereafter within a further four weeks, the question of liability for such payment will be treated as one of the disputes.

#### 63. SETTLEMENT OF DISPUTES:

All disputes between the parties shall be referred to the award of two arbitrators (one to be nominated by the "Contractor" and one by the "Chairman"), or in case of the said arbitrators not agreeing, then to the award of an Umpire to be appointed by the said arbitrators in writing before proceeding in the reference. The decision of the arbitrators or in the event of their not agreeing, of the Umpire appointed by them shall be final and binding on all parties to the Contract and the provisions of the Indian Arbitration Act of 1940 and the rules thereunder and any statutory modification thereof shall be deemed to apply to such reference and deemed to be incorporated in the Contract. The arbitration award shall be given claimwise."

As per item (i) of Clause 62 it is clear that all

questions relating to the meaning and interpretation of the specifications, designs, drawings and instructions and as to the quality of workmanship or material used on the work or any matter arising out of or relating to the specifications, designs and drawings and instructions concerning the works or the execution of or failure to execute the same, arising during the course of the works and in the guarantee period, the decision of the Engineer shall be final. At the same time, the clause also contains a condition that the above shall not be subject for arbitration and in no case the work be stopped consequent to such a dispute arising between the parties and the work was to be carried out by the Contractor strictly in accordance with the instructions of the Engineer. As per Clause 63 all the disputes between the parties have to be referred for arbitration to the two arbitrators (one to be nominated by the Contractor and one by the Chairman) and in case of disagreement between the two arbitrators the Umpire is to be appointed by the said arbitrators in writing before proceeding with the reference. The decision of the arbitrators or in the event of their not agreeing, the decision of the Umpire shall be final and binding on all parties to the Contract and the provisions of the Indian Arbitration Act and the rules thereunder and any statutory modification thereof shall be deemed to apply to such reference and deemed to be incorporated in the Contract and the arbitration award shall be given claimwise. While the position of law with regard to the dealing with the Awards under the Arbitration Act and the same being made rule of the Court and the grounds and scope of interference in such matters is quite limited, in view of the principles, as laid down by the Supreme Court in various decisions, one thing is certain that in case the Arbitrator or Umpire exceeds the scope of arbitration agreement in any form, such an Award and decree of the Court making such an award the rule of court, is liable to be set aside. Mr. Mihir Thakore himself has very candidly stated before us that in case it is found that the Umpire has exceeded the scope of the Arbitration Agreement and has acted contrary to the terms and scope of the Agreement, such Award may be set aside but he maintains that in the case at hand such grounds are totally wanting.

11. If we apply the well recognized principle, that as and when the Arbitrator has exceeded the scope of the subject matter of Arbitration Agreement, the Award cannot be sustained, on the facts of the present case, we find that so far as the question of fault in design is concerned, the same was kept out of the scope of Arbitration in terms of Clause 62(i). The question of

fault in design was raised as a dispute by AFCONS to claim the withheld payments. The contention that it was the defence raised by AFCONS against the stand of KPT and, therefore, it could be considered by the Umpire while passing the Award does not appear to be correct and tenable proposition in our view for the simple reason that what cannot be done directly cannot be done in an indirect manner and, therefore, when the question of defect in design could not be a subject matter for arbitration at all, that could not be made a ground so as to reject the claim of KPT and accept the claim of AFCONS so as to pass an Award in favour of AFCONS and against the KPT. In our considered opinion the Umpire has clearly and certainly exceeded the scope of the subject matter of Arbitration Agreement in the facts of the present case. We, therefore, find that the Award passed by the Umpire, as has been made the rule of the Court, cannot be sustained in the eye of law and the matter, therefore, deserves to be remanded back to the Umpire to re-consider the Reference de novo without taking into consideration the AFCONS's plea with regard to the fault in design, in terms of the Contract and in the light of the observations made in this order as above and we order accordingly.

12. The impugned judgment, order and decree passed by the Court on 29.1.2000 in Special Civil Suit No.293 of 1995 and the Award, as has been passed by the Umpire on 5.5.1994 are hereby set aside. The Umpire may proceed de novo in accordance with law as directed by us in Para 11. It will be open for both the sides to produce any more document or material and lead evidence on which they seek to place reliance before the Umpire.

13. This Appeal is partly allowed in the terms, as aforesaid. In the facts and circumstances of this case, the parties are left to bear their own costs.

14. In view of the order passed in the main Appeal, no further orders are required to be passed in Civil Application No.5756/2000 and the same is hereby rejected. Rule is discharged therein.

(M.R.Callan,J)

(D.A.Mehta,J)

